

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRANDY MCINNIS

Claimant

VS.

VALUE PLACE WICHITA SOUTH LLC.

Respondent

AND

ACCIDENT FUND INS. CO. OF AMERICA

Insurance Carrier

Docket No. 1,032,424

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 30, 2007, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. James R. Roth, of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for temporary total disability benefits because there was no evidence that respondent acted in bad faith in terminating claimant after she tested positive on a drug screen.

The record is the same as that considered by the ALJ and consists of the transcript of the March 27, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

¹ K.S.A. 44-534a.

by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²

ISSUES

Claimant requests review of the ALJ's denial of temporary total disability benefits. Claimant contends that whether respondent acted in bad faith is immaterial. Claimant asserts that she was terminated for missing work to go to physical therapy, not because she failed a drug test. She also asserts that she challenged the results of the drug test given by respondent, but respondent would not retest her. She also presented evidence that a subsequent drug test taken by a parole officer was negative for the same controlled substance.

Respondent argues that the Board does not have jurisdiction to review a preliminary hearing Order regarding payment of temporary total disability benefits and requests that the Board dismiss claimant's appeal. Respondent maintains that at this time, it is not denying the compensability of claimant's injury and is not alleging that she was under the influence of a controlled substance when injured or that her drug use caused or contributed to her accident.

The issues for the Board's review are:

- (1) Does the board have jurisdiction over the issue in this appeal?
- (2) If the board finds it has jurisdiction, is claimant entitled to temporary total disability compensation?

FINDINGS OF FACT

Claimant worked as a facilities supervisor for respondent. On November 27, 2006, she had just clocked out and was walking out of the office into the hallway when she fell and hurt her arm. Her supervisor was standing near when she fell and asked her if she needed to see a doctor. Later that day, claimant went to the hospital, and she was taken off work for two days. After two days, she returned to work but was going to physical therapy. She had restrictions of no lifting, pushing, pulling, or carrying more than 5 pounds, no kneeling, and no over-arm reaching.

On December 18, 2006, claimant and a coworker were pulled from work and given drug screen tests. Claimant's coworker was then dismissed from the room, and claimant

² K.S.A. 2006 Supp. 44-555c(k).

was told that she was missing too much work attending physical therapy. She was told that she would be allowed to work to January 1, 2007, and then would be terminated. Respondent had not yet received the results of the drug test.

On December 26, 2006, claimant received a telephone call from the drug screen company telling her that she had failed the drug screen. She then spoke with respondent's property manager, Summer Hatfield, and requested a retest. Two hours later, Ms. Hatfield called claimant into her office and told her she was suspended. Claimant was told to go home and return to work the next morning. When claimant went to work the next day, she was told she was still suspended. Two days later, Ms. Hatfield called her and asked her to come into the office, at which time claimant was told she was being terminated for failing the drug screen test. Respondent never retested claimant for drugs as she had requested.

During this time period, claimant had a criminal drug case pending and was reporting to court services once a week. She was also giving random drug urinalysis tests. Claimant told her court services officer about the failed drug test and asked for a copy of her past drug tests. A memo from Sedgwick County Department of Corrections dated January 11, 2007, indicates that claimant had passed drug screening tests on November 6, 2006, and December 20, 2006.

On March 14, 2007, Dr. John Estivo gave claimant weight lifting restrictions of 0 to 10 pounds for her right arm, as well as no over the shoulder height work with her right arm. Claimant has looked for work since her termination but has not been able to find a job because of her work restrictions.

PRINCIPLES OF LAW

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.³ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁴

³K.S.A. 2006 Supp. 44-551.

⁴*Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

ANALYSIS

Claimant was working, albeit with restrictions, before she was terminated by respondent. During the preliminary hearing before the ALJ, counsel for respondent told the court that respondent was not denying the compensability of this claim or raising drugs as a defense under K.S.A. 2006 Supp. 44-501(d)(2). Therefore, even though the ALJ did not specifically state it, the ALJ must have denied claimant temporary total disability benefits because he found she did not meet the definition of being temporarily and totally disabled, not because she tested positive for drugs. The ALJ did not determine that the claim was not compensable. Accordingly, none of the jurisdictional issues listed in K.S.A. 44-534a have been raised in this appeal. Furthermore, K.S.A. 44-534a grants the ALJ jurisdiction to decide issues concerning a claimant's entitlement to temporary total disability at a preliminary hearing.

CONCLUSION

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁶

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that claimant's appeal from the Order of Administrative Law Judge Thomas Klein dated March 30, 2007, is dismissed.

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁶ *See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge